IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.T.SANKARAN

TUESDAY, THE 28TH NOVEMBER 2006 / 7TH AGRAHAYANA 1928

Crl.Rev.Pet.No. 4174 of 2006()

CRA.761/2005 of SESSIONS COURT, KOZHIKOE
ST.2011/2004 of JUDL. MAGISTRATE OF FIRST CLASS-III, KOZHIKODE

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REVN. PETITIONER: APPELLANT/ACCUSED

K.ABDUL GAFOOR,
PROPRIETOR, A&S AGENCIES,
KEEREERAKATH HOUSE, MANGAD, P.O.KALLIASSERI,
KANNUR DISTRICT.

BY ADV. SMT.LATHA PRABHAKARAN

RESPONDENTS: RESPONDENTS/COMPLAINANT

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1. M/S.VIJU ENTERPRISES CEMENT DEALS,
14/72, PETTA, FEROKE, REP. BY ITS AUTHORIZED
POWER OF ATTORNEY HOLDER AND ACCOUNTANT-CUM-CLERK,
KLATHUNGAL BADARUL MUNEER, S/O.ABUTTY.

2. STATE OF KERALA,
REP. BY ITS PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM.

BY PUBLIC PROSECUTOR SRI.KAMMAPPU

THIS CRIMINAL REVISION PETITION HAVING COME UP FOR ADMISSION ON 28/11/2006, THE COURT ON THE SAME DAY PASSED THE FOLLOWING:

K.T.SANKARAN, J

Crl. R.P. No.4174 of 2006

Dated this the 28th day of November, 2006

ORDER

The petitioner is the accused in S.T. 2011 of 2004 on the file of the court of Judicial Magistrate of First Class III, Kozhikode. The complaint was filed by the respondent, a partnership firm alleging offence under Section 138 of the Negotiable Instruments Act. The trial court convicted the petitioner and sentenced him to undergo simple imprisonment for a period of six months and to pay a sum of Rs.1,49,520/- to the complainant as compensation under Section 357(3) of the Code of Criminal Procedure. In default of payment of compensation, the accused was sentenced to undergo simple imprisonment for a period of three months. The petitioner challenged the conviction and sentence in appeal. The appellate court reduced the substantive sentence of imprisonment to imprisonment till the rising of the court. The direction to pay the compensation was confirmed.

2. The case of the complainant is that the complainant

firm is a dealer in cement and the accused purchased cement from the complainant firm on credit basis. The balance outstanding as payable by the accused was Rs.1,49,520/-. Towards payment of that balance amount, the accused issued Ext. P3 cheque dated 17.11.2003. On presentation of the cheque, it was dishonoured on the ground of 'insufficiency of funds' on account of the accused. Ext.P5 notice was issued to which the petitioner sent Ext. P6 reply.

3. The power of attorney holder of the complainant was examined as PW1. He proved Ext.P7 extract of the accounts maintained by the complainant regarding the transaction between the complainant and the accused. Ext. P7 was not disputed by the accused. The issue of cheque is also not disputed by the accused. The case put forward by the accused is that he was liable to pay only Rs.90,000/- and after receipt of the notice, he repaid the same in two installments of Rs.45,000/-. It was further contended that the accused used to purchase cement from the branch office of the complainant at Kannur and that he had no business dealings with the branch office of the

complainant at Feroke. It was admitted by the complainant who was examined as DW1 that he purchased cement for an amount of Rs.2,15,000/- from the complainant. This is admitted in Ext. P6 reply notice as well. As per Ext. P7 accounts, the balance outstanding as payable by the accused was Rs.1,49,520/-.

4. The contentions put forward by the accused were rejected by the trial court. If the case of the accused that he had business dealings only with the Kannur branch of the complainant is true, he could very well prove the same by producing the bills. The accused did not produce the bills. The case put forward by the accused that he repaid Rs.90,000/- after receipt of the notice was disbelieved by the trial court in the absence of any documentary evidence to prove the same. It cannot be believed that a wholesale dealer in cement would not issue receipt after receipt of the amount due from another dealer. It cannot be believed that the accused would pay Rs.90,000/- without getting any evidence for having paid the same. The case that he had dealings only with Kannur branch was rightly disbelieved by the trial court. The trial court held

that the presumption under Section 139 of the Negotiable Instruments Act is available in favour of the complainant and that the accused had not rebutted the presumption.

5. Another contention put forward by the accused is that there are seven partners in the complainant partnership firm and Ext. P1 power of attorney was executed by only three of them and therefore the power of attorney holder could not present the complaint and adduce evidence on behalf of the partnership firm. When it is admitted by the accused that he had liability to the partnership firm, the question is whether payment of the amount to the firm through the power of attorney holder would constitute a valid discharge. If the compensation amount is paid as directed by the trial court there could be no further claim in respect of Ext. P1 cheque by the complainant partnership firm since the amount covered by the cheque was paid by the accused. Therefore, the contention that the power of attorney holder could not present the complaint as Ext.P1 power of attorney was executed only by three partners and therefore the complaint is not maintainable, is unsustainable. The contentions

raised by the petitioner herein in this regard were considered in detail in paragraph 6 of the appellate court's judgment. I concur with the view taken by the appellate court.

6. The lower appellate court considered the evidence in detail and concurred with the view taken by the trial court. The substantive term of imprisonment was reduced to imprisonment till the rising of the court by the appellate court. No grounds are made out for interference in revision under Section 397 of the Code of Criminal Procedure. However, taking into account the facts and circumstances of the case and the submission made by the learned counsel for the petitioner that if reasonable time is not granted to the accused to pay the compensation amount, he would have to undergo default sentence of imprisonment, I am inclined to grant three months' time to the petitioner/accused to pay the compensation.

In the result, this Crl.R.P. is disposed of in the following manner:

(i) The conviction of the petitioner under Section 138 of the

Negotiable Instruments Act is confirmed.

(ii) The sentence as imposed on the petitioner by the lower appellate court is confirmed.

(iii) However, the petitioner is granted three months' time to pay the compensation amount of Rs.1,49,520/-.

(iv) The execution of the default sentence shall be kept in abeyance for a period of three months.

K.T.SANKARAN,
JUDGE

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